Supreme Court of the United States

OCTOBER TERM, 1923—No. 200.

JAMES EVERARD'S BREWERIES,
Complainant-Appellant,

against

RALPH A. DAY, Prohibition Director of the State of New York, FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York, WILLIAM HAYWARD, United States Attorney, and DAVID H. BLAIR, as Commissioner of Internal Revenue,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLANT'S BRIEF.

WILLIAM M. K. OLCOTT,
WALTER E. ERNST,
NATHAN BALLIN,
Of Counsel for Appellant.

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Introductory Statement.

This is an appeal from the Final Decree of Honorable Learned Hand, United States District Judge, dismissing the bill of complaint, which decree was entered February 25, 1922 (Record, fols. 110-112, pp. 58 and 59).

Prior to the entry of the decree, the Court had made an order denying the motion for a

preliminary injunction, and directing that the motion of the defendants to dismiss the complaint be granted (Record, p. 58, fol. 109).

The issues presented on this appeal directly involve a constitutional question, namely, the construction of Section 2 of the Act Supplemental to the National Prohibition Law, passed on November 23, 1921, commonly known as the Willis-Campbell Act.

There have been four actions instituted to test the validity of this Act,—the first *Falstaff* v. *Allen*, arose on a motion for a preliminary injunction before Judge Faris in the District Court of Missouri. The opinion is reported in 278 Fed. Reporter 643; the second, *Piel* v. *Day*, was brought in the United States District Court, Eastern District of New York. A motion for a preliminary injunction was argued before Judge Garvin and denied. His opinion is reported in 278 Fed. Reporter 223.

The order of Judge Garvin denying the motion for preliminary injunction was taken to the United States Circuit Court of Appeals in the Second District, and there argued, and that Court affirmed Judge Garvin without opinion. A memorandum of the decision of the Circuit Court of Appeals appears in 281 Fed. Reporter 1022.

The *Piel* case was brought before this Court on an appeal from this order, and it was agreed by counsel that it should be passed and brought before the Court at the same time as the case at bar.

The third is the instant case.

The fourth case was that of *E. & J. Burke, Ltd.* v. *Blair*, decided by Judge Knox in the United

States District Court, Southern District of New York, who wrote a short opinion following the decisions in *Falstaff* v. *Allen,* and *Piel* v. *Day.*

Burke v. *Blair* also will probably be before this Court at the same time as the present case.

The precise question involved in this appeal has not, as yet, been decided in this Court. Certain phases of the Willis-Campbell Act have been construed in two recent decisions,—one by Judge Knox in *Lambert* v. *Yellowley,* decided in the United States District Court, Southern District of New York, which held that portion of the act limiting the number of prescriptions to be given by a physician, to be unconstitutional. This decision was later followed by Judge Bourquin in the District of Montana who made a similar ruling in the case of *United States* v. *Freund.* These decisions are reported as follows:

Lambert v. *Yellowley,* 291 Fed. Rep. p. 640.

United States v. *Freund,* 290 Fed. Rep. p. 411.

Statement of Facts as to the Issues in This Case.

This action, brought for an injunction to restrain the enforcement of the provisions of the Willis-Campbell Act, was based upon the amended bill of complaint, together with the supplements thereto, and upon the various affidavits of physicians which are annexed to the Record.

The epitomé of the amended complaint is as follows:

It is alleged that complainant is a brewery organized in 1895, and that it has its place of

business at 133d Street and Madison Avenue, Borough of Manhattan, City of New York, and that it has a valuable plant (Record, p. 3).

Then are set forth the enactment of the Eighteenth Amendment to the Constitution of the United States, and of the National Prohibition Act, and there appear in the complaint such definitions as are valuable relative to the phraseology with which we are concerned, and especially (p. 6) the regulations for the manufacture and dealing in liquor for non-beverage purposes.

There is further pleaded the promulgation of Regulations 60, by the Secretary of the Treasury, which provided an elaborate permit system for dealing in alcoholic liquors not to be used for beverage purposes (Record, p. 51).

There is further set forth, the opinion of Attorney General Palmer rendered on March 3, 1921, at the instance of the Secretary of the Treasury, whereby the Attorney General expressed the view that it was not within the purview of the Eighteenth Amendment to prohibit the manufacture of liquors for medicinal purposes, and that the Eighteenth Amendment contained no such prohibition (Record, pp. 6 and 7). Thereafter, on or about October 24, 1921, the Commissioner of Internal Revenue amended the regulations, and especially Regulations 60, and in relation to the brewing of intoxicating malt liquors for medicinal purposes, provided a system of permits by which this could be done. Acting under these regulations, the complainant gave a bond for $25,000 and applied for permits (Complaint, paragraphs XVI and XVII, p. 7).

Thereafter, the complainant complied with all the regulations of the Collector of Internal Rev-

enue in respect to the payment of taxes, and did all things necessary for the brewing of malt liquors, and had actually brewed 900 barrels when the Act Supplemental to the National Prohibition Law, passed on November 23, 1921, became effective, whereby the sale of this intoxicating malt liquor for medicinal purposes was rendered illegal. The complainant was unable to dispose of its product except by de-alcoholizing, which would necessitate a great financial loss (Record, p. 8).

The amended complaint further sets forth the rights of the complainant in respect to co-operation with physicians and pharmacists relative to the manufacture and sale of malt intoxicating liquors for medicinal purposes, and the injury which it has sustained by the enactment of the Act of November 23, 1921 (Record, pp. 10 and 11). The amended complaint prays for a restraining order and injunction against the respective defendants (Record, pp. 14 and 15).

There are annexed to the amended bill, Exhibit A, The Eighteenth Amendment to the Constitution (Record, pp. 15 and 16); Exhibit B, Treasury Decision 3239 (Record, pp. 16 to 21 inclusive). This decision extended the regulations for the manufacture of intoxicating malt liquors for medicinal purposes, and followed the opinion of Attorney General Palmer.

Exhibit C is a letter from the Treasury Department giving more precise directions as to methods to be pursued in brewing intoxicating malt liquors (Record, pp. 21 and 22).

Exhibits D and E are the permits issued to the complainant (Record, pp. 22 to 24).

Exhibit F is an exact copy of the Supplemental Law, the Willis-Campbell Act, as to which Section

2, and particularly the first sentence thereof, are in question in this attack on the constitutionality of that Act.

In addition to the amended complaint, there appear in the Record many affidavits of physicians which detail their opinion relative to the therapeutic value of intoxicating malt liquors for medicinal purposes. These, briefly digested, attribute the following valuable medicinal properties to intoxicating malt liquors, to wit:

(1) They are beneficial to the aged and infirm.

(2) They are valuable for children who suffer from malnutrition and for rickety children.

(3) They are valuable as a galactogogue, that is, for use by nursing mothers, during the period of lactation.

(4) They often tend to increase the appetite and stimulate the gastric secretion, and aid in digestion.

(5) In cases of insomnia, when taken before retiring, they are valuable aids in producing satisfactory sleep, and act in such cases as a useful sedative.

It is to be observed that the District Court in the instant case did not render an opinion, and did not pass upon the therapeutic properties of intoxicating malt liquors, and this is still an open question to be determined as a question of fact in the event of reversal and a trial of the issues before the Court below.

The dismissal of the complaint rested solely upon constitutional grounds, and there is not, in

any of the opinions which have been reported, an adjudication as to whether or not intoxicating malt liquors possess the medicinal properties which are claimed for them in this action.

The opinion of Judge Garvin in *Piel* v. *Day,* recites the fact that the complainant in that action, as in the instant case, bitterly disputed the decision of Congress in having summarily held that intoxicating malt liquors did not possess medicinal properties. (See 278 Fed., at page 226).

In *Falstaff* v. *Allen,* decided by Judge Faris, 278 Fed. 643, the issue as to the medicinal property of alcoholic malt liquors was not raised, and it is so stated in the opinion, page 644.

We therefore approach the consideration of this appeal, with the proposition vitally presented, that Congress has in its discretion summarily determined that malt liquors do not possess medicinal properties, and has assumed to declare this as a scientific fact. Congress has eliminated by the Willis-Campbell Act, the privilege previously enjoyed by breweries of assisting the medical profession, in supplying these intoxicating malt liquors for medicinal purposes, to permittee druggists, for distribution.

Assignments of Error.

It is asserted by the assignments of error (Record, pages 61 and 62), that the Court below erred in failing to grant a preliminary injunction, in dismissing the bill of complaint, in failing to hold Section 2 of the Act Supplemental to the National Prohibition Act to be unconstitutional,

and erred further, in holding that Congress was justified from a constitutional standpoint, in enacting legislation which prohibited the manufacture, by breweries, of intoxicating malt liquors, and which likewise forbade physicians to prescribe, and druggists to sell, such intoxicating malt liquors under proper permits, and likewise, that the Court below erred in holding that Congress was the sole judge of its acts as to the reasonableness of legislation pertaining to the enforcement of the National Prohibition Law.

These assignments of error embodied in the said specifications and summarized above, present the crux of the questions involved, namely, whether in the enforcement of National Prohibition, Congress may so legislate as to decide by its declaratory power what is, or is not, fitted for medicinal use, and thereby so extend the Eighteenth Amendment, in order to affect the prohibition for beverage purposes, by eradicating also the use of malt liquor, previously valid for medicinal purposes.

Preface to Points.

There are four fundamental propositions involved in this appeal, to be discussed in the three points of this brief, which we assert render Section 2 of the Willis-Campbell Act unconstitutional. These are summarized as follows:

(1) Because it is destructive of the personal liberty of the physician to prescribe and of the patient to be treated in such manner as the physician, from his knowledge and experience, deems best for the patient.

(2) Because it is an unwarrantable interference and destruction of the right of breweries to co-operate with physicians, patients and druggists in the manufacture and sale of intoxicating malt liquors for medicinal purposes, a use never prohibited by the Eighteenth Amendment.

(3) Because the attempt of Congress to make such an enactment is not within its powers, as contravening that portion of the Federal Constitution which limits to Congress the express powers delegated to it, and expressly reserves to the states those powers not delegated.

(4) Because in the delegation of powers, the police power of internal regulation, in respect to the rights of citizens of states, and more particularly in regard to health, has never been a power delegated under the Constitution of the United States to Congress, and is, therefore, a power clearly reserved to the individual states under the general police power vested in them.

This leads us to the discussion of our points which follows:

I. The Eighteenth Amendment to the Federal Constitution prohibited the use of intoxicating liquors for beverage purposes only.

II. The states by the Eighteenth Amendment did not delegate to Congress the power to regulate health. The complete suppression of malt liquors for medicinal purposes infringes upon such state power.

III. The prohibition of intoxicating malt liquors for medicinal purposes is neither an appropriate nor a reasonable exercise of the prohibitory power of Congress.

POINT I.

The Eighteenth Amendment to the Federal Constitution prohibited the use of intoxicating liquors for beverage purposes only.

The Eighteenth Amendment reads as follows:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction hereof for beverage purposes is hereby prohibited.
>
> Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
>
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

It is apparent from the language of this amendment that the limitation is to the prohibition for beverage purposes only. Moreover, in the enactment of the National Prohibition Law, commonly known as the "Volstead Act," the very heading indicates that Congress recognized the differentiation as to the use of liquors prohibited by the amendment, for that heading reads:

"An Act to Prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries."

By the Volstead Act, Congress also assumed to make regulations, not only for the prohibition of intoxicating liquors for medicinal purposes, but also to regulate the manufacture and sale for other purposes not covered by the Eighteenth Amendment, such as sacramental and industrial uses. There is not, at present, any decision of this Court which specifically sustains the right of Congress to make such regulations.

The justification for it, may be found in the theory, that Congress assumed to do it because the excessive use of intoxicating liquors for purposes, other than beverage, might lead to their abuse in that persons ostensibly manufacturing liquors for the other three purposes, would divert these liquors to beverage use.

It was in furtherance of this object, that the Department issued Regulations 60, and amended these regulations so as to include a permit system for intoxicating malt liquors in Treasury Decision 3239.

This was subsequent to the opinion of Attorney General Palmer, rendered March 3, 1921, who said:

"In answering the first three questions, it may be well to quote the language of my opinion of December 13, 1920 (32 Op. 361), where in referring to Section I, Title II of the National Prohibition Act, I said: The word

'liquor' is expressly defined in Section I above quoted, to include whiskey and other liquors enumerated in Section I, it is provided that the term 'liquor, includes alcohol,' brandy, whiskey, rum, gin, beer, ale, porter, wine and liquors enumerated in your first three questions, come within the definition of the term 'liquor' * * *

It was not the purpose of Congress to prohibit the use of liquor for non-beverage purposes, as is evidenced by the wording of the title of the National Prohibition Act.

'An act to prohibit intoxicating beverage and to regulate the manufacture, production, use and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol, and promote its use in scientific research and in the development of fuel, dye and other lawful industries' (41 Stat. 305).

However, it was necessary to regulate the traffic in non-beverage liquor in order to accomplish the purpose of the Act, which was as stated, to prevent the use of liquors for beverage purposes. *The use of liquor as a medicine was recognized by Congress to be a non-beverage use.* This is shown by the provisions made for the issuance of permits to prescribe (see Section 7, Title II, 41 Stat. 311). I am, therefore, of opinion that the Commissioner may issue permits."

and further said:

"The manufacture or sale of liquor for medicinal purposes has not been prohibited. The *Constitutional amendment does not expressly confer power to prohibit either.* It may be assumed that Congress, for the purpose of making the prohibition law effective, could have placed some limit upon the quantity of liquor that should be either manu-

factured or sold for medicinal purposes, and that it might have indicated, in general terms, the character of such limitation, and authorized the Executive officers to carry out the purpose thus expressed by proper regulations. I can find in the Act, however, no purpose either to directly impose such a limitation, or to confer upon the executive officers any power to do so. I think, therefore, that a regulation having this in view, could be, in effect, an amendment of the Statute and not a mere regulation to carry out the expressed purpose of Congress. Section 6 of the Act contains a number of provisions relating to permits, and must be taken to describe in general, the scope of the regulations which may lawfully be promulgated. There is no reference here, however, to a purpose to limit the quantity produced or sold." (Italics ours.)

The validity of War Time Prohibition, the Eighteenth Amendment, and the Volstead Act, were passed upon in

Hamilton v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146;
Ruppert v. *Caffey*, 251 U. S. 264;
Rhode Island v. *Palmer*, 253 U. S. 350.

In these cases there is direct recognition that the prohibition of intoxicating liquors was for beverage purposes only. We refer to certain quotations from *Rhode Island* v. *Palmer*, which indicate that this Court recognized the limitation of the amendment to prohibition for beverage purposes, for Justice Van Devanter said in his conclusions known as Subdivisions 10 and 11:

> "That power may be exerted against the disposal for *beverage* purposes of *liquors* manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.
>
> While recognizing that there are *limits beyond which Congress cannot go in treating beverages as within its power of enforcement,* we think those limits are not transcended by the provision of the Volstead Act (title II, sec. 1), wherein liquors containing as much as ½ of 1 per cent of alcohol by volume, and fit for use for beverage purposes, are treated as within that power. *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, *ante,* 260, 40 Sup. Ct. Rep. 141." (Italics ours.)

and Chief Justice White commenting on the limitation, likewise said in his opinion:

> "In the first place, it is indisputable, as I have stated that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not *define the intoxicating beverages which it prohibited,* in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the *prohibited beverages,* but also of enacting such regulations and sanctions as were essential to make them operative when defined. In the third place, when the second section is considered with these truths in mind it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of

> government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and Federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative." (Italics ours.)

Fundamentally, there is presented this concrete proposition that the Eighteenth Amendment did not prohibit the use of intoxicating liquors for medicinal purposes. As Justice White lays down the rule that it is for Congress to define the character of an intoxicating beverage, does it follow that there is in Congress a declaratory power not only to define intoxicating liquor, but also to declare what is, and what is not medicinal, and thus destroy completely the use of malt intoxicating liquors previously valid for medicinal purposes?

We assert that this declaratory power has not been specifically passed on in the opinions of this Court in either *Ruppert* v. *Caffey*, or *Hamilton* v. *Kentucky Distilleries*, because the limitation to liquor containing more than ½ of one per cent alcohol is merely a definition by Congress of what is an intoxicating liquor. Of course, the complete prohibition of the use of malt liquors authorized by the War Time Prohibition Act of November 21, 1918, covered by the *Hamilton* case, was merely a justification of the

extraordinary powers exercised by Congress and the President during a period of national emergency. In none of these decisions by this Court, has there been any expression of opinion which authoritatively passes upon the present proposition.

Some light may possibly be derived from the opinion in *Street* v. *Lincoln Safe Deposit Company,* 254 U. S. 88, where the first limitation on the Enforcement of the Volstead Act was made. This Court there held that the Volstead Act did not prohibit the lawful storage of intoxicating liquors for beverage purposes, and did not prohibit the transportation from a storage warehouse company to the home of the appellant, for the Court held that so long as the liquor was not to be used for sale, barter or exchange, or disposition in violation of the provisions of the law, the Government could not prevent its removal from the storage warehouse to the home.

In the concurring opinion, Mr. Justice McReynolds said:

> "The Eighteenth Amendment gave no such powers to Congress,—manufacture, sale and transportation are the things prohibited—not personal use."

While the Street case may not be directly germane, it has this important bearing on the issues of the present controversy, namely, that it indicates the tendency of this Court to limit the language of the amendment so as to provide for prohibition only within those limits directly set forth in its context namely, manufacture, sale and transportation of intoxicating liquors for beverage purposes.

POINT II.

The states by the Eighteenth Amendment did not delegate to Congress the power to regulate health. The complete suppression of malt liquors for medicinal purposes infringes upon such state power.

We approach the discussion of this point with the feeling that so often has there been placed before this Court, the question of state delegation of power, the limitation upon the police power of the states, and the denial of such power to Congress, except where necessary to carry out a constitutional function, that it would be useless to overburden this brief with citations based upon such fundamentals. We have, therefore, confined our citations to cases, which relate directly to the limitation upon Congress from enacting statutes which transgress the established rights of the States in the control of health. This is still a State function, and remains undelegated to Congress. We also cite some cases relative to the exercise of the police power in carrying out these functions which may constitutionally be exercised by Congress.

In Judge Garvin's opinion in *Piel* v. *Day*, which is before this Court, 278 Fed. 223, the Learned Judge conceded that:

> "(1) Without the Eighteenth Amendment, the Willis-Campbell Act would have been an attempted exercise of police power. That power has never been delegated by the states to the federal government" (*Prigg* v. *Pennsylvania*, 41 U. S. 539, at page 625).

But, further said in his second proposition:

> "(2) The authority of this decision is not questioned. If, however, Congress cannot effectively enforce the provisions of the Amendment involved, except by the exercise of police power, it is well settled that it may exert such power."

Judge Garvin in the third proposition, page 226, justifies the Willis-Campbell Act by the investigation which Congress made relative to the medicinal qualities of beer, and also refers to the fact that certain states had considered it essential, in the enforcement of their respective liquor laws, to forbid absolutely the use of certain liquors for any purposes. Here we are met at once with the situation (as the Government contended below, and will no doubt contend here) that because the States have assumed in certain cases in order to carry out their State prohibition laws, to absolutely forbid the use of intoxicating malt liquors, even for medicinal purposes; that this affords a justification for Congress to do likewise.

On this proposition there was cited below, and will no doubt be cited here, *Purity Extract* v. *Lynch*, 226 U. S. 192. This case was referred to in the opinion of Mr. Justice Brandeis in *Ruppert* v. *Caffey*, 251 U. S. 264, at page 289.

In *Purity Extract* v. *Lynch*, in which the prevailing opinion was written by Justice Hughes, it was decided only that the State might in the exercise of its police power prohibit the use of intoxicating malt liquors in order to effectually carry out its State Prohibition, for Justice Hughes said:

"That the state, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is undoubted. *Bartemeyer* v. *Iowa,* 18 Wall, 129, 21 L. ed. 929; *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25, 24 L. ed. 989; *Mugler* v. *Kansas,* 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd* v. *Pearson,* 128 U. S. 1, L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Crowley* v. *Christensen,* 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13. It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. *Booth* v. *Illinois,* 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *Otis* v. *Parker,* 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Ah Sin* v. *Wittman,* 198; U. S. 500, 504, 49, L. ed. 42, 1144, 25 Supp. Ct. Rep. 756; N. Y. ex rel. *Silz* v. *Hesterberg,* 211 U. S. 31, 53 L. ed. 75, 29 Supp. Ct. Rep. 10; *Murphy* v. *California,* 225 U. S. 623, 56 L. ed. 1229, 32 Sup. Ct. Rep. 697. With the wisdom of the exercise of that judgment, the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold, otherwise, would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system."

There cannot, in the course of that opinion, be found any specific authority to hold that what was permitted to the States, was likewise delegated to Congress, for the prohibition of liquors for medicinal purposes was not included in the delegation of power covered by the Eighteenth Amendment. It is apparent that the power of the States to enforce prohibition, resting on the general rights of the State to regulate the health of its citizens, was a broader function, and not subject to the limitation which has been fastened upon Congress by the express language of the Eighteenth Amendment.

This leads us, naturally, to the first sub-division of this point, namely, in relation to the delegation of power.

This Court need hardly be reminded of the fundamental proposition frequently reiterated that the National Government is one of delegated powers, which were derived from the States by the original Constitution, and its successive amendments. It may thus be briefly summarized, that by the Constitution as first enacted, the States surrendered many functions to the National Government, and that these functions were gradually enlarged by the various amendments which followed since 1787. It is also elementary that the distinction between National and State functions still remains, and that the powers which are undelegated still rest in the States.

Among these functions, the power to regulate health was never delegated by the States to Congress, and is, therefore, a power expressly reserved to the States. It is apparent that the right to practice medicine, the right to manufacture

drugs, and the right to manufacture liquors for medicinal purposes, still exist undisturbed, and that Congress has no express power to interfere with these rights. If, in the regulation of National Prohibition for beverage purpose, it becomes necessary to establish certain restrictions upon the manufacture of intoxicating liquors for non-prohibited purposes, these restrictions must always be taken in connection with the Constitutional right of the individual to enjoy those privileges of life, liberty and pursuit of happiness, which are guaranteed to him under the Constitutions not only of the United States, but also of the States.

In the decisions of this Court, this distinction is manifested in the cases in which acts of Congress have been held to be unconstitutional because they violate State functions, or because Congress has transcended its power.

That there is such limitation upon the power of Congress is well illustrated in *Marshall* v. *Gordon,* 243 U. S. 521, where Congress sought to punish a former United States Attorney for the publication of certain letters in connection with proceedings against a former member of the House of Representatives, then under investigation, because of alleged illegal conditions relative to the Sherman Anti-Trust Law. The House adjudged Mr. Marshall in contempt, and issued a Warrant of Arrest. A Habeas Corpus was sued out and this Court held that Congress was without power in this matter. Chief Justice White said in the course of the opinion, at page 536:

> "No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal

with contempt committed by its own members. Article I, Sec. 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people of the states, it follows that no other express authority to deal with contempt can be conceived of. It comes, then, to this: was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution, and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been authoritatively settled and is not open to be disputed. *Anderson* v. *Dunn*, 6 Wheat, 204, 5 L. ed. 242; *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. ed. 377. Whether the right to deal with contempt in the limited way provided in the state Constitution may be implied in Congress as the result of the legislative power granted must depend upon how far such limited power is ancillary or incidental to the power granted to Congress,—a subject which we shall hereafter approach."

That the exercise of the regulation of health is purely a matter of State control is exemplified in two cases which may be contrasted, for they pertain to the same general subject matter. These are—

Keller v. *United States,* 213 U. S. 138;
Hoke v. *United States,* 227 U. S. 308.

In *Keller* v. *U. S.,* 213 U. S. 138, 144, we have a forceful example of the limitation by our highest tribunal of an invalid Act of Congress. There Congress passed an act to prohibit the introduction into this country of alien prostitutes, but went further by making it a felony for any person to harbor a girl for such purpose within three years after she shall have entered the United States. The constitutionality of this Act was attacked, because it was held that the regulation of prostitution after the entrance of the alien into the State was a matter of State jurisdiction, and not a subject of Federal legislation. The Court reversed the conviction, and held this portion of the Act unconstitutional in the following language:

> "The single question is one of constitutionality. Has Congress power to punish the offense charged, or is jurisdiction thereover solely with the State? Undoubtedly, as held, 'Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers.' United States ex rel. Turner v. Williams, 194 U. S. 279, 289, 48 L. ed. 979, 983, 24 Sup. Ct. Rep. 719. See also Fong Yun Ting v. United States, 149 U. S. 98, 708, 37 L. ed. 905, 911, 13 Sup. Ct. Rep. 1016; Head Money Cases (Edge v. Robertson), 112 U. S. 580, 591, 28 L. ed. 798, 801, 5 Sup. Ct. Rep. 247; Lees v. U. S., 150 U. S.

476, 480, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163; U. S. vs. Bitty, 206 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396.

It is unnecessary to determine how far Congress may go in legislation with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien; for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense came within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the constitution no grants thereof to Congress."

In the *Hoke* case (supra), the Mann Act, which had for its essence, the transportation of women for immoral purposes from one State to another, was sustained, not because it bore relation to internal health or morals (although these are incidentally affected), but because it was proper legislation based upon interstate commerce, a power expressly given to Congress in Section 8, Article I of the Federal Constitution.

Practically all convictions under the Mann Act hinge upon whether the element of interstate transportation of the woman for alleged immoral purposes was present. If such element does not exist, the judgment of conviction has been usually

reversed. (*Simpson* vs. *United States*, 245 Fed. 278; *Bayer* v. *United States*, 251 Fed. 35, and *Huffman* vs. *United States*, 259 Fed. 235.)

More recently, in the decision of the Child Labor Law, this Court has held that the power of Congress, even though intended to be beneficial, may not be asserted in respect to a purely State function, for in *Bailey* v. *Drexel Furniture Company*, 259 U. S. 20, the Court held the recent Federal Child Labor Law to be invalid. Chief Justice Taft said:

> "It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.
>
> Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the con-

> trary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

The power of the State in respect of health has also been recognized by such cases as *Jacobson* v. *Mass.*, 197 U. S. 11; *Dent* v. *W. Va.*, 129 U. S. 114; and *Watson* v. *Maryland*, 218 U. S. 173, in all of which the power of the State to regulate vaccination, and the practice of medicine is distinctly asserted and established as a State, and not a National function.

In the previous case construing the former Child Labor Law, *Hammer* v. *Dagenhart*, 247 U. S. 251, the limitations upon the powers of Congress in respect of purely State functions, were clearly pointed out in the opinion of Mr. Justice Day, who said:

> "The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> The grant of authority over a purely Federal matter was not intended to destroy the

local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. 'This,' said this Court in *United States* v. *Dewitt*, 9 Wall. 41, 45, 19 L. ed. 593, 594, 'has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported, on former occasions, that we think it unnecessary to enter again upon the discussion.' See *Keller* v. *United States*, 213 U. S. 138, 144-146, 53 L. ed. 737-740, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Cooley, Const. Lim. 7th ed., p. 11. * * *

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children.

In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; 'this principle' declared Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579, 'is universally admitted.'

A statute must be judged by its natural and reasonable effect. *Collins* v. *New Hampshire*, 171 U. S. 30, 33, 34, 43 L. ed. 60-62, 18 Sup. Ct. Rep. 768. The control by Congress over interstate commerce cannot au-

> thorize the exercise of authority not intrusted to it by the Constitution. Pipe Line Cases (*United States* v. *Ohio Oil Co.*, 234 U. S. 548, 560, 58 L. ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The maintenance of the authority of the states over matters purely local is as essential to the preservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution."

In *United States* v. *Doremus*, 249 U. S. 86, the Harrison Drug Act was declared constitutional because it related to the taxing power of the United States. This decision did not directly refer to, nor did it assert the power of Congress to regulate the use of drugs in the various states, and it cannot be presumed to go further than its limits, namely, that the Act provided certain regulations for physicians and pharmacists in view of the taxing power of the Federal Government.

A striking illustration of the constitutional right of a person to be treated medicinally as he chooses, or in fact, not to be treated at all, appears in the case of *People* v. *Cole*, 219 N. Y. 98. There, Judge Chase of the New York Court of Appeals, held invalid the conviction of a healer of the Christian Science Church, in violation of the public health laws of the State of New York, in that he assumed to practice medicine. Judge Chase in the course of his opinion, said:

> "It appears from the record that it is a tenet of the Christian Science Church that prayer to God will result in complete cure of particular diseases in a prescribed, in-

dividual case. Healing would seem to be not only the prominent work of the church and its members, but the one distinctive belief around which the church organization is founded and sustained.

It is claimed that the church extends its influence and spreads knowledge of its power by practical demonstration on the part of its sincere practictioners in securing the overthrow of moral, mental and physical disease. It disclaims any reliance upon skill, education or science. In view of the tenets of the Christian Science Church the exception to the prohibition of the statute is broader than the provision of the Constitution of this state which we have quoted and which permits the free exercise and enjoyment of religious profession and worship without discrimination or preference.

The exception in the statute is not confined to worship or belief but includes the practice of religious tenets. If it was the intention of the legislature to relieve members of the Christian Science and other churches from the provisions of sections 160 and 161 of the Public Health Law to the extent of permitting them within the rules, regulations and tenets of a church to maintain an office and there offer prayer for the healing of the diseases of those that might come to such church members for treatment, and the defendant has in good faith acted in accordance therewith, he is not guilty of the crime alleged in the indictment."

The cases above cited fundamentally indicate that in the states only does the regulation of the health of the individual lie, and this power has not been delegated to Congress by the Eighteenth Amendment.

The justification for the prohibition of malt liquors for medicinal purposes by the Willis-Campbell Act rests solely upon the implied power in Congress, which is asserted by the Government, to carry out the spirit of the Eighteenth Amendment by the enactment of appropriate legislation. We assert that the total prohibition of intoxicating malt liquors for medicinal purposes is neither necessary, reasonable, nor appropriate, as is demonstrated in our Third Point.

POINT III.

The prohibition of intoxicating malt liquors for medicinal purposes is neither an appropriate nor a reasonable exercise of the prohibitory power of Congress.

It was asserted in the courts below, and will, no doubt, be claimed here by the Government, that Congress having been vested by the Eighteenth Amendment with the power to prohibit the use of intoxicating liquors for beverage purposes, may enact, (as did the states prior to the amendment), such laws as may be deemed necessary to effectually carry out the spirit of the amendment even, although such acts of Congress infringe upon the police powers of the state.

There is, however, the other principle, that what is called by Congress appropriate legislation, may not infringe upon the constitutional powers of Congress, for this Court from its very inception has asserted and exercised the power to

declare null and void, such legislation, however economically beneficial, as may transgress the fundamentals of the Constitution.

It is unquestioned that the Federal Courts have no concern with the motives of Congress and the wisdom of legislation as a matter of political or economic expediency. When, however, such statutes infringe upon constitutional rights, this Court has frequently set aside what might be deemed to be a wise regulation of Congress from an economic standpoint. This viewpoint was well illustrated in *McCulloch* v. *Maryland,* 4 Wheaton 316, where Chief Justice Marshall said at page 423:

> "But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

In the discussion in Congress relative to the power to pass the Willis-Campbell Act, Senator Stanley addressing the Senate in opposition, asserted that the attempt of Congress to prohibit the medicinal use of alcohol, was in violation of the Constitution, for he said (Congressional Record, p. 9038, 67th Congress):

> "* * * The Senate does not determine by this bill whether beer shall be sold or prohibited as a beverage or whether any other beverage shall be sold or prohibited.
>
> This is not a question as to the enforcement of the eighteenth amendment; this is not a question as to the enforcement of the Volstead Act. Good or bad, the eighteenth amendment has been adopted; wise or unwise the Volstead Act is a part of the organic law of the land. No Senator who opposes this bill is opposing the eighteenth amendment. No Senator who opposes this bill is opposing the Volstead Act. No Senator who opposes this bill is advocating the sale of any kind of an alcoholic beverage. This bill has nothing to do with the sale of beverage alcohol.
>
> This bill, in the first place, provides for prohibition of the medicinal use of alcohol in certain forms, *although the eighteenth amendment does not prohibit the medicinal use of alcohol in any form whatever. This bill proposes that a legis*lative body, comprising one doctor in its membership, shall pass upon a question which no man who is not a doctor can determine. With the exception of the Senator from Delaware (Dr. Ball) I doubt if there is a Senator in this body who knows anything more about the medicinal use of alcohol than he does about repairing his watch, and yet, in answer to the demand of a propaganda laymen and lawyers have

> resolved themselves into a pharmaceutical association and are passing upon a technical question about which doctors differ and in open violation of the Constitution of the United States." (Italics ours.)

We have also judicial authority for the proposition that the power to prohibit the use of liquors as a beverage, does not extend to the power to prohibit them as a medicine, for in *Sarrls* v. *Commonwealth*, 83 Ky. 427, at pages 331-332, the Court said:

> "The social order, health and security of a local community may, in the opinion of the Legislature, require that the selling or giving of spirituous, malt or vinous liquors, to be used as a beverage, be prohibited, as to which, as well as any other subject affecting the health or morals of a community, that department of the government has the power to determine; and it is not inconsistent with that object to authorize the sale of liquors as medicines when necessary for that purpose; on the contrary, while the Legislature has the power to regulate the sale of liquors to be used as a beverage, or to prohibit its sale for that purpose altogether, *it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as a medicine.*"

And again:

> "If the Legislature has the power at all to prohibit the sale of intoxicating liquors by retail, it exists alone because the health, peace and order of society require it; and upon that ground alone this court, without dissent, has heretofore decided it may be exercised; but there being no reason therefor, *the power of the Legislature to prohibit the prescription*

> *and sale of liquors to be used as medicine does not exist,* and its exercise would be as purely arbitrary as the prohibition of its sale and use for religious purposes." (Italics ours.)

And in commenting upon this decision, Mr. Freund in his work on police power at page 210, said:

> "All prohibitory laws make an exception in favor of sales for medical purposes. This is not a legislative indulgence but a constitutional necessity, *since the state could not validly prohibit the use of valuable curative agencies on account of a remote possibility of abuse.* (Italics ours.) *'The power of the legislature to prohibit the prescription and sale of liquor to be used as medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale for religious purposes.'*"

In his opinion in the Lambert case, which has been referred to in our Introductory Statement, Judge Knox cited the Sarris case with approval, and referring to the medicinal use of liquor, said:

> "The Eighteenth Amendment to the Constitution was designed to bring about the prohibition of intoxicating liquor 'for beverage purposes,' and was not, I think, intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the States that ratified it, as justifiable and proper. This view was, in part, at least, entertained by Congress in enacting the Volstead law, which permits the sale and use of sacramental wines; the use, in bona fide hospitals or sanitariums of such quantity of liquor, as may properly

be administered under the direction of a duly qualified physician employed therein, to a person suffering from alcoholism, and the use of industrial alcohol, under certain restrictions, in arts and sciences. So far as the sacramental use of wine is concerned, there is no specified limitation of the quantity that may be purchased and consumed. Instead of manifesting the same solicitude for the physical well-being of a person suffering from a disease (other than alcoholism), the proper treatment of which demands more than a pint of liquor within ten days, that it evinced for the spiritual comfort and welfare of members of certain religious sects, Congress restricted in the manner complained of, the medicinal use of intoxicating liquor."

The judicial authority in the decisions of Judges Knox and Bourquin, holding that the Willis-Campbell Act in respect to the limitation of the right of physicians to prescribe a given quantity, applies with equal force to the restriction upon the physician to prescribe a malt, rather than a spirituous or vinous liquor, and inferentially to the pharmacist and brewery which formerly assisted in the distribution and manufacture of such malt liquor.

It appears evident that Congress has transcended the bounds of its authority under the guise of enacting appropriate legislation, when it assumed to exercise the right to declare malt liquors to be non-medicinal, for that function could only be exercised by the physicians, or at best, by the States in their regulation of health.

Approaching, also, the matter of reasonableness, some thought is evoked—namely wherein did the reasonableness of the prohibition of the medical

use of malt liquors arise, since a proper permit system, as intended by Treasury Decision 3239, had just come into force before the Willis-Campbell Act was under consideration,—a system in all essentials the same as that for the control of medicinal-purpose spirits; obviously there is greater bulk in malt liquors than in spirituous, and yet Congress did not assume to prohibit the latter for medical use; nor did it prohibit such use, notwithstanding that violations were obviously more easily effectible with spirituous than with the bulkier fermented malt liquors, beer and ale.

Congress discriminates between the higher alcoholics such as whiskey, rum, gin, and the lower alcoholics, such as beer and ale, not as may be expected in a prohibition bill intended to abolish intoxication by excluding the higher intoxicants, but destroys the medicinal use of beer and ale (by nature far more innocent), when it is without the professional capacity to appraise either their inherent medicinal values, specific or general.

The Government attempts to defend the action of Congress in the argument that a flood of beer was expected because the Treasury Department following Attorney General Palmer's opinion, granted permits to brewers to manufacture beer for medicinal purposes.

May it not be pertinently asked, why there should be any greater flood of beer and malt liquors, if the manufacture for medicinal purposes were kept under regulation by the permit system, then has been and is the case, in reference to the sale and distribution of spirituous and vinous liquors by permittee druggists under prescriptions of physicians for medicinal purposes?

Conceding that there are occasional violations of the law by physicians and druggists in respect of spirituous and vinous liquors, would there be any greater violation in respect of malt liquors which are bulkier, and whose distribution is far more difficult than that of the higher alcoholics?

There was nothing in the previous experience under the Government's medicinal permit-system controlling spirituous liquors and, by the extension of this system, by Treasury Decision 3239, to fermented malt liquors, as administered, that had indicated or warranted the assumption of an "open flood of beer or ale" or that its prescription by druggists had or would necessarily transgress the Eighteenth Amendment, by having such malt liquors, prescribed for medicinal purposes, diverted to beverage uses. The Prohibition Commissioner's public statements as to the effective control of spirituous liquor prior to the enactment of the Willis-Campbell Act,—and even more emphatically since,—undeniably indicated (and indicates) that the medicinal permit system would control the medicinal permit use of beer, even more effectively than such use of spirits, because of the greater bulk of beer. This unconstitutional transgression on the health function of the State, which the Government assumes to justify as necessary legislation to enforce the Eighteenth Amendment, cannot be defended on such grounds either within the doctrine of appropriateness or reasonable necessity. The prohibition of medicinal malt liquors by the Willis-Campbell Act stands as an unwarranted exercise of the power of Congress in prohibiting a medicinal-purpose liquor when the Eighteenth Amendment authorized prohibition only for beverage purposes.

One word may be said in conclusion of this point in reference to the declaratory power of Congress, for that must be taken with reasonable limitation also. May a legislature declare a scientific fact because it has instituted some investigation? Because of such investigation, may Congress arbitrarily assume that malt liquors have no medicinal properties. That doctrine was referred to by Judge Garvin in the opinion in the Piel case, in which he said:

> "* * * it would therefore appear that Congress deemed this legislation imperative to accomplish effective enforcement of the amendment, and at the same time was satisfied that there is little or no value in beer either as a therapeutic agent or as a galactogogue."

In its last analysis, the scientific or medicinal value of the product should rest with the physician. Congress has transgressed not only the constitutional right of the physician to determine what is beneficial for his patients, but also the constitutional right of the patient to receive from the physician the prescription of malt liquors, if the physician deems it best for the health of his patient. In this enactment Congress assumed a function which it did not constitutionally possess. The declaratory power to define what is intoxicating, namely, the limitation to an alcoholic content of ½ of one per cent, may not be extended so as to give Congress power, also, to declare non-medicinal, a form of liquor which has been recognized by leading physicians as having marked medicinal and therapeutic properties.

We have in the Record affidavits from physicians of eminence on both sides, which indicate the division of opinion in the medical profession. May it be said, therefore, that Congress can positively establish a scientific fact?

A recent exhibition of legislative folly is the attempt in Kentucky to prohibit the teaching of the Doctrine of Evolution in educational institutions. That question has never been tested constitutionally, but may we not assert that whether evolution is, or is not a correct theory, is not a matter for legislation, but a matter for scientists. So also, whether malt liquors do or do not possess medicinal properties, rests in the last analysis, with the physician, not with the Legislature or Congress.

Judge Knox, in his opinion, declared "unconstitutional" that portion of Section 2, which limited the number of prescriptions of spirituous liquors and the method of prescribing by a physician. Is it not with equal force, true that the character of the liquor which the physician may prescribe, is also one which does not lie with Congress, but rests with the physician to determine what is best for his patient, subject to reasonable Congressional regulation?

The import of this decision is that while the declaratory power of Congress is conceded by Judge Knox, even that power is subject to the limits imposed by the Constitution—in this instance the 18th Amendment. While Congress may regulate under its declaratory power within the precincts of powers delegated or necessarily implied in the delegation thereof, it may not deny or prohibit a constitutional right not so dele-

gated; its declaratory power is exercisable to *regulate* not *to prohibit* such right; and such regulations may not transcend the limitations of that portion of the Constitution, which it seeks to aid.

CONCLUSION.

The attempt by Congress to destroy the use of malt liquors for medicinal purposes was an invalid assumption of congressional power, and Section 2 of the Act Supplemental to Prohibition of November 23, 1921, is in this respect unconstitutional.

We therefore respectfully ask that the Final Decree of the United States District Court be reversed, that the bill of complaint be reinstated, and that the motion for a preliminary injunction be granted.

WILLIAM M. K. OLCOTT,
WALTER E. ERNST,
NATHAN BALLIN,
Of Counsel for Appellant.